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In the Supreme Court of the United States

OCTOBER TERM 1960

No. 551

PAUL GINSBURG, *Petitioner*

v.

BESS KEATS GINSBURG and JOHN PAUL GINSBURG, Minors, by their Guardian Ad Litem, BETTY K. GINSBURG, *Respondents*

Brief of Respondents in Opposition to Petition for Writ of Certiorari

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I.

QUESTIONS PRESENTED FOR REVIEW

1. Is an order of the Court of Appeals denying a preliminary motion by petitioner to "Open up and Vacate the District Court Orders Appealed From and to Retransfer and Remand the Cause to the Pennsylvania District Court for Trial" reviewable on certiorari?

2. Did the Court of Appeals abuse its discretion in ordering petitioner's appeal dismissed for failure to perfect the same by refusing to comply with the rules of the Court of Appeals?

II.

STATUTES AND RULES INVOLVED

U. S. Code, Title 28, U.S.C.A. Rules for the Ninth Circuit, Rule 17 (6):

> "In all cases, including those on petition for review to enforce or to set aside an order of a United States Board or Commission, the appellant or petitioner, upon the filing of the record in this court, shall file with the clerk a concise statement of the points on which he intends to rely. With such statement the appellant or petitioner shall file a designation of all of the record which is material to the consideration of the appeal or review and forthwith serve on the adverse party a copy of the statement and designation . . ."

III.

STATEMENT OF THE CASE

Although petitioner's Statement of the Case is almost entirely inaccurate, it is unnecessary to dwell thereon since most of the statements therein are neither material nor relevant to the instant petition for certiorari. The only matters pertinent to a determination of this petition are contained in the record of proceedings that occurred in the Court of Appeals for the Ninth Circuit. These proceedings are a part of the record herein, having been designated as Volume 3 of the record by the Clerk of the Court of Appeals. (Particular documents therein will be referred to by name, date and the document number assigned by the Clerk in his Index.)

The record reveals that the entire record of the proceedings in the United States District Court for the District of Arizona was transmitted and certified to the Court of Appeals for the Ninth Circuit on January 15, 1960. On February 10, 1960, immediately following disposition by the Court of Appeals of a preliminary motion (Document No. 3), the clerk of the Court of Appeals advised appellant that he must, pursuant to the Court's Rule 17 (6), immediately serve and file a statement of points and designation of record.

Instead petitioner on February 23, 1960, filed a Motion for Stay of Proceedings. (Document No. 4) This motion was denied on March 18, 1960. (Document No. 6) Following denial of this motion, petitioner still refused to comply with Rule 17 (6), filing instead a "Motion to Open Up and Vacate the District Court Orders Appealed from and to Retransfer and Remand the Cause to the Pennsylvania District Court for Trial". (Document No. 7) This motion was denied by the Court on April 11, 1960. (Document No. 12)

On April 5, 1960, there still having been no compliance with Rule 17 (6), respondents filed a Motion to Dismiss the appeal based upon petitioner's failure to perfect the same. (Document No. 9) Upon petitioner's request, the hearing on this matter was postponed and set for May 9, 1960 in San Francisco. Petitioner filed still another motion for a stay of proceedings on April 29, 1960 (Document No. 13) which was denied by the Court of Appeals on May 4, 1960. (Document No. 17) On May 9, 1960 counsel for respondent appeared and presented the Motion to Dismiss to the court. Petitioner did not appear either in person or by counsel. At this time, he had still failed to comply with Rule 17 (6). The Court of Appeals thereupon dismissed the

appeal. (Document No. 18) (In addition, this Court itself twice denied motions of petitioner to stay proceedings in the Ninth Circuit prior to the dismissal of petitioner's appeal. The first such motion was presented on November 13, 1959, the second on May 5, 1960. Both were denied forthwith.)

IV.

REASONS FOR DENYING WRIT

1. The Court of Appeals properly denied petitioner's "Motion to Open Up and Vacate the District Court Orders Appealed From and to Retransfer and Remand the Cause to the Pennsylvania District Court for Trial."

2. The Court of Appeals properly exercised its discretion in dismissing petitioner's appeal for failure to comply with Rule 17 (6).

V.

ARGUMENT

1. Denial of Petitioner's "Motion to Open Up and Vacate the District Court Orders Appealed from and to Retransfer and Remand the Cause to the Pennsylvania District Court for Trial".

The Court's denial of this motion raises none of the grounds specified in Rule 19 (b), *Revised Rules of the United States Supreme Court*, as reasons for granting certiorari.

The Court of Appeals correctly denied this motion for the reason that it was without any supporting basis in the record and presented issues, which if properly raised at all, were determinable only upon a review of the judgment appealed from and not by way of a preliminary motion. None of the matters raised in Questions 1-5 of petitioner's brief (pages 2-4) were ever properly presented to the Court of Appeals and should not be considered as grounds for granting certiorari.

Furthermore, the matters urged in support of the instant petition have previously been urged unsuccessfully upon this Court in *Ginsburg v. Gourley*, No. 663, October Term, 1959.

2. Judgment of May 9, 1960 Dismissing the Appeal.

Failure to serve and file the required statement of points and designation of record constitutes a failure to perfect the appeal and is grounds for dismissal of the appeal. *Beecher v. Smithson* (C.A. 9, 1953), 205 F.2d 113; *Beecher v. Leavenworth State Bank* (C.A. 9, 1954), 214 F.2d 114; *Hargraves v. Bowden* (C.A. 9, 1954), 217 F.2d 839. This has been held especially true where, as here, an appellant has already prolonged the litigation in an unwarranted manner. *Beecher v. Leavenworth State Bank*, supra.

When respondents' motion to dismiss the appeal was presented, considered and granted almost three months had elapsed since respondents' preliminary motion had been disposed of and petitioner had been notified by the Court of Appeals to file immediately his statement of points and designation of record. Petitioner had been denied a stay of proceedings by the Court of Appeals twice and by this Court twice. Nevertheless, petitioner persisted in his refusal to comply with Rule 17 (6). Clearly it was within the discretion of the Court of Appeals to dismiss petitioner's appeal for failure to so comply.

Petitioner's contention that the dismissal was obtained by misrepresentations on the part of respondents is without any foundation whatever. The same record now before this Court was before the Court of Appeals when respondents' motion to dismiss was considered and granted, as well as when petitioner's motion for rehearing was considered and denied. The portions of the record referred to in respond-

ents' Statement of the Case, supra, fully support the action of the Court of Appeals.

Finally, petitioner's argument that he was excused from compliance with Rule 17 (6) by filing a series of preliminary motions in the Court of Appeals or by filing petitions for certiorari in this Court is without merit. Were petitioner's contention true, then he would have it in his power to prevent a determination of the appeal indefinitely.

(Petitioner's continuous efforts since 1953 to delay and protract this litigation are set out in part in the memorandum filed by respondents on February 27, 1960 in the Court of Appeals.) (Document No. 5) The Court's attention is respectfully directed to this memorandum and particularly to pages 2 through 9 thereof.)

Respondents respectfully submit that the Petition should be denied.

Respectfully submitted,

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